

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM R. HALL, JR.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Period December 1,	:	
1975 through October 9, 1980.	:	

Petitioner, William R. Hall, Jr., c/o Jeffrey Armstrong, Esq., 22 First Street, P.O. Box 208, Troy, New York 12181, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1975 through October 9, 1980 (File Nos. 800481 and 805587).

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, W.A. Harriman Campus, Albany, New York on June 13, 1988 at 1:15 P.M. and concluded at the same offices on June 14, 1988, with all briefs to be filed by September 5, 1988. Petitioner appeared by Pattison, Sampson, Ginsberg and Griffin (Jeffrey Armstrong, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner, William R. Hall, Jr., was a person required to collect and pay over sales tax on behalf of Old Homestead Country Kitchen, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) during the period at issue.

II. Whether penalties and interest in excess of the minimum, which were imposed against petitioner, should be waived.

FINDINGS OF FACT

1. On December 29, 1982, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due to petitioner, William R. Hall, Jr. The first notice assessed sales and use taxes for the period December 1, 1975 through May 31, 1979 in the amount of \$25,558.81 plus penalty of \$6,389.70 and interest of \$13,033.68 for a total amount due of \$44,982.19. The second notice assessed sales and use taxes for the period June 1, 1979 through October 9, 1980 in the amount of \$36,919.01 plus penalty of \$9,229.75 and interest of \$12,579.20 for a total amount due of \$58,727.96. In each instance, the notice stated that petitioner was personally liable for the taxes determined to be due from Old Homestead Country Kitchen, Inc. ("Old Homestead").

2. On July 6, 1984, the Audit Division issued three notices and demands for payment of sales and use taxes due to petitioner as follows:

<u>Period Ending</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
5/31/78	\$ 5,669.80	\$ 1,417.45	\$ 4,683.13	\$11,770.38
8/31/78-11/30/79 and 10/9/80	31,915.79	7,978.95	22,074.36	61,969.10
2/29/80-8/31/80	24,754.23	6,188.55	13,870.37	44,813.15

Although there are slight discrepancies between the amounts assessed by the notices of determination and demands for payment of sales and use taxes due and the notices and demands for payment of sales and use taxes due, they were premised on the same liability.

3. On June 6, 1985, the Appellate Division issued its decision in Matter of William R. Hall, Jr. v. New York State Tax Commn. (108 AD2d 488). In this decision, which considered only the notices dated December 29, 1982, the court concluded that administrative hearings were authorized only for the periods ending May 31, 1978, February 29, 1980 and May 31, 1980 because no tax returns were filed for these periods. The court further held that an administrative hearing should be conducted for the period ending August 31, 1980 because the return filed for this period was incorrect or insufficient.

4. On February 12, 1988, the Bureau of Conciliation and Mediation Services issued a Conciliation Order which dismissed the Notice and Demand dated July 6, 1984 pertaining to the periods ending August 31, 1978 through November 30, 1979 and the period ending October 9, 1980. The other notices dated July 6, 1984 were sustained in full by the Conciliation Order.

5. At the hearing, the parties stipulated that if Mr. Hall is found responsible for the taxes due from Old Homestead, the amount of the tax liability is \$19,182.99. This liability arises from the quarterly periods ending May 31, 1978, February 29, 1980, May 31, 1980 and August 31, 1980.

6. During the years 1973 through 1976, while petitioner attended college, he was employed at the Old Homestead during the summers.

7. Most, if not all, of the outstanding stock of the restaurant was owned by a Mr. Kenneth Renaud,¹ who also held the office of president.

8. In 1976 petitioner completed college and began working as manager of the restaurant for a weekly salary. In this capacity, petitioner had numerous duties. Depending on the level of staffing, petitioner would cook or perform occasional bartending duties. For a period of time, petitioner signed payroll checks, but at some juncture, it was no longer necessary for petitioner to sign checks because the restaurant began using a computerized payroll system. As manager, petitioner supervised the performance of the dishwashers, and in connection with this duty, had the authority to hire and fire employees. The other individuals who worked in the kitchen were hired either by petitioner or Mr. Renaud. With respect to employment of waitresses, petitioner participated in the interview process and had input as to who would be hired; however, it was ultimately the responsibility of the head waitress to hire for the shift she supervised.

¹It is unclear from the record whether Mr. Renaud's first or second wife owned stock in the restaurant during the periods in issue.

9. As manager, petitioner was responsible for controlling inventory. This function involved ordering food, wine and also small equipment such as pots and pans. Mr. Renaud made the decisions whether to purchase large equipment such as an oven or refrigerator.

10. Petitioner shared responsibility with the head waitress for counting the cash in the cash register at the end of the shift and verifying it against the sales for the day. The following day, petitioner would ascertain the portion of the cash receipts attributable to bar sales and the portion derived from beer sales. If the cash in the register did not equal the day's sales, petitioner attempted to determine why there was a shortage or overage. On occasion, petitioner deposited the day's receipts in the bank.

11. Petitioner was a signatory on the corporate checking account and had the authority to pay recurring bills. Thus, when a supplier of food made a delivery, petitioner was responsible for paying the bill. In addition, if a payment schedule was established with a supplier, petitioner made payments in accordance with that schedule. When certain suppliers required payment in cash, petitioner paid the invoices from these suppliers as well.

12. It was petitioner's understanding that he was expected to check with Mr. Renaud before drafting checks for large sums of money (unless the expense was recurring) or for unusual expenditures. Thus, it was petitioner's practice to confer with Mr. Renaud before drafting a check for more than \$1,000.00, unless it was for a recurring item. Petitioner also felt that he was required to obtain Mr. Renaud's approval before drafting a check for taxes. Consequently, whenever petitioner drafted a check for taxes, it was at the direction of Mr. Renaud.

13. At one time, Mr. Renaud told petitioner that if a document had to be signed by a corporate officer and he was not available, petitioner was to sign as vice-president. Nevertheless, petitioner never received formal notification that he was appointed vice-president.

14. The sales and use tax returns of the restaurant for the period December 1, 1975 through November 30, 1977 were signed by Mr. Renaud as president with the exception of the period ended August 31, 1976 for which no return is in the record.² Commencing with the part-quarterly period ending December 31, 1977 and continuing through the quarterly period ending November 30, 1979, all of the sales and use tax returns filed by the restaurant (that is, nine returns) were signed by Mr. Hall as vice-president, except for the period ending May 31, 1979 which he signed without the use of a title. The return for the period ending August 31, 1980 was signed by petitioner as president. However, this return listed the establishment as the Old Homestead Country Kitchen of Burnt Hills, Inc.

15. It was the bookkeeper's practice to prepare the sales and use tax returns and then send them to Mr. Renaud for his signature. At the hearing, the bookkeeper acknowledged that she was surprised to learn of the number of sales tax returns signed by Mr. Hall.

16. The bookkeeper also had the authority to draft checks. However, she would not draft a check for a large bill or for taxes without the approval of Mr. Renaud.

17. On one occasion the restaurant's bookkeeper advised Mr. Renaud that money should

²The original return for the quarterly period ended February 28, 1977, was signed by Mr. Renaud as president. An amended return for this period was also signed by Mr. Renaud but did not list a title.

be set aside for taxes. In response, Mr. Renaud just shrugged his shoulders.

18. Prior to August 25, 1980, Mr. Renaud exercised substantial authority over the assets and activities of the restaurant. For example, Mr. Renaud took money from the cash register for his own use and used a credit card issued in the name of the business to purchase personal items. Mr. Renaud's wife periodically stocked their personal refrigerator with items from the restaurant's kitchen.

19. It was Mr. Renaud's practice to make business decisions without seeking the advice of anyone employed by the restaurant. Thus, he agreed to a payment schedule with the Internal Revenue Service and directed that petitioner send a weekly check in satisfaction of this schedule. Mr. Renaud purchased another restaurant, using the shrimp and lobster from the Old Homestead to stock the second restaurant. At another time, he purchased the building next door and used the receipts from the Old Homestead to purchase inventory for a new establishment.

20. On August 25, 1980 petitioner purchased the restaurant from Mr. Renaud. In conjunction with this purchase, petitioner applied for a liquor license from the New York State Liquor Authority ("SLA"). The application resulted in an investigation by the SLA. In conjunction with this investigation, petitioner produced statements from his checking account which disclosed regular deposits in the low thousand dollar range. When asked how he was able to make such large deposits on a purported salary of \$200.00 a week, petitioner explained that he had commingled the business funds of the restaurant with the funds in his personal checking account.

21. Petitioner commingled funds on two separate occasions when the restaurant's checking account was frozen. On the first occasion the commingling occurred for one or two days. On both occasions, petitioner was careful to account for all of the money from the restaurant. There were other times when a payment to a supplier had to be made and the restaurant did not have the cash available to make the required payment. At those times petitioner drafted a check from his personal checking account and thereafter reimbursed himself from that evening's restaurant receipts.

22. Petitioner did not own any stock in the corporation.

CONCLUSIONS OF LAW

A. That it is important to use the proper form to assess the tax due since the form advises the taxpayer "of the actions being taken and the problems being encountered" (Matter of Hall v. New York State Tax Commn., 108 AD2d 488, 490). When a taxpayer fails to file a sales and use tax return or the return filed is incorrect or insufficient, the proper method for the Audit Division to assess the sales and use taxes due is through the issuance of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (20 NYCRR 535.6; Matter of Hall v. New York State Tax Commn., supra). Since no returns were filed for the quarterly periods ending May 31, 1978, February 29, 1980 and May 31, 1980, the notices and demands for payment of sales and use taxes due were improperly issued for these periods and are cancelled. Similarly, since the return filed for the period ended August 31, 1980 was incorrect or insufficient, the notice and demand for payment of sales and use taxes due for this period was improperly issued and therefore cancelled.

B. That, in general, section 1133(a) of the Tax Law imposes upon any person required to

collect the tax imposed by Article 28 of the Tax Law, personal liability for the tax imposed, collected, or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

C. That in Matter of Autex Corporation (Tax Appeals Tribunal, November 23, 1988), the factors for determining whether an individual is a person or officer under a duty to act for a corporation were set forth as follows:

"The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183). Factors stated by the Division's regulations are whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b] [2]).

Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Commn., 124 AD2d 437); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 1023); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax & Finance, 98 Misc 2d 222, 225-226); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 391). Within closely held corporations, 'an officer's knowledge of the corporate affairs and his benefits received from corporate profits (are) extremely important considerations' (Vogel v. NY Tax & Finance, supra, at 226)."

D. That on the basis of the foregoing standards, it is clear that petitioner was under a duty to act for the restaurant with respect to the sales and use taxes due. It is undisputed that petitioner was authorized to sign tax returns and managed the corporation. Moreover, petitioner derived substantial income from the corporation, wrote checks on behalf of the corporation and had knowledge of and control over the financial affairs of the corporation. Therefore, petitioner was properly considered a person required to collect sales tax on behalf of the Old Homestead.

Petitioner attempted to portray his authority with respect to the payment of taxes as very limited, and maintained that he signed sales and use tax returns only when Mr. Renaud was unavailable. This position is unpersuasive. The fact that for a period of almost two years petitioner was the only individual who signed the sales and use tax returns shows that he bore a substantial degree of responsibility for the sales and use taxes due from the corporation. Petitioner's responsibility for the financial affairs of the corporation is confirmed by his activity of depositing the business receipts into his personal account. It is also revealed by petitioner's practice of paying the expenses of the restaurant from his personal checking account and seeking reimbursement from the restaurant's receipts. It is apparent that petitioner shared responsibility for the sales and use taxes due, and he cannot avoid liability by arguing that he could act only

upon Mr. Renaud's permission.³

E. That Tax Law § 1145(a)(1) authorizes the imposition of a penalty for failure to file a return or to pay or to pay over any tax under Article 28 in a timely manner. During the period in issue, Tax Law § 1145(a)(1)(former [ii]) further provided that if the failure or delay was due to reasonable cause and not willful neglect, penalty and that portion of interest which exceeds the minimum amount of interest prescribed by law shall be remitted.

In his brief, petitioner presented arguments as to why his conduct does not warrant the imposition of a penalty. However, before these arguments are considered, one must first examine whose failure or delay must be due to reasonable cause before the relief requested should be granted. As noted, section 1133(a) of the Tax Law imposes personal liability for the tax imposed, collected or required to be collected by the restaurant. Thus, the liability imposed on petitioner is derived from the liability imposed on the restaurant. It follows, under the principle of derivative liability, that before the penalties against petitioner may be remitted, it must be shown that the restaurant acted with reasonable cause in not complying with the requirements of Article 28 of the Tax Law. In this instance, petitioner has not presented any evidence which would establish that the restaurant acted with reasonable cause when it failed to file returns or filed an incorrect or insufficient return.

F. That the Audit Division is directed to adjust the notices of determination and demands for payment of sales and use taxes due in accordance with Finding of Fact "5".

G. That the petition of William R. Hall, Jr. is granted to the extent of Conclusions of Law "A" and "F"; the Audit Division is directed to cancel the notices and demands for payment of sales and use taxes due and modify the notices of determination and demands for payment of sales and use taxes due accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
February 9, 1989

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

³In reaching this conclusion, it is noted that the testimony of the bookkeeper must be discounted. Her acknowledged surprise at seeing petitioner's signature on numerous sales and use tax returns reveals that she was not familiar with the restaurant's practices regarding sales tax.